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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID AVALOS AYALA,

Defendant and Appellant.

B173371

(Los Angeles County
Super. Ct. No. BA242025)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Tricia Ann Bigelow, Judge. Affirmed.

Greg M. Kane, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Lawrence M. Daniels and Robert S. Henry, Deputy Attorneys General, for Plaintiff
and Respondent.

BACKGROUND

Appellant, David Avalos Ayala, was convicted of aggravated sexual assault of a child under the age of 14, in violation of Penal Code section 269, subdivision (a)(1), as charged in count 1 of the information, a forcible lewd act upon a child in violation of section 288, subdivision (b)(1), as charged in count 2, an attempted lewd act upon a child in violation of section 664/288, subdivision (a), as charged in count 3, and a lewd act upon a child in violation of section 288, subdivision (a), as charged in count 4.¹ On February 10, 2004, appellant was sentenced to 15 years to life plus seven years in prison, and filed his notice of appeal the following day.

DISCUSSION

Appellant contends that statements he made were obtained in violation of his *Miranda* rights, and should have been excluded.² He also contends that there was not substantial evidence to support his conviction of attempted lewd act upon a child, as charged in count 3, and he asserts sentencing errors.

1. *Miranda Rights*

At the outset of trial, an Evidence Code section 402 hearing was held to determine whether appellant had voluntarily made statements to Detective George Granillo, the investigating officer in this case.

Granillo testified that he interviewed appellant on January 15, 2003, the day of his arrest, at around 10:00 or 11:00 a.m., while appellant was in custody. Granillo called appellant out of his jail cell, walked him over to an interview room,

¹ All statutory references are to the Penal Code, unless otherwise indicated.

² See *Miranda v. Arizona* (1966) 384 U.S. 436.

and asked him to sit. The interview room is furnished with a table and two chairs, the atmosphere was informal, and appellant was not in handcuffs. Granillo was dressed in a suit and tie, not a uniform, and did not have a weapon with him.

Granillo testified that when appellant was seated, he read *Miranda* warnings to him from a card. Granillo neglected to bring the card to court, but recited its contents from memory. He said to appellant, “You have the right to remain silent,” “You have a right to an attorney and to have them present during questioning,” “You have the right, if you cannot afford an attorney, one will be appointed to you.” Granillo also informed appellant that if he could not afford an attorney, one would be appointed at no cost to him, that anything he said could and would be used against him in a court of law. After each warning, Granillo asked appellant, “Do you understand?” Each time Granillo asked whether appellant understood, appellant said, “Yes.”

Granillo testified that he then asked appellant, “Do you wish to talk to me?” Appellant replied, “I will talk to you,” which Granillo took as a waiver. They spoke English, and appellant appeared to understand everything that was said to him. Granillo testified that he never threatened appellant, appellant never asked for an attorney, and appellant appeared to speak to him willingly. Granillo denied that he threatened appellant in any way, and denied that he ever told him that if he did not talk, he would make things worse for him.

Appellant also testified at the hearing. In his testimony, appellant claimed that Granillo did not read any of the enumerated rights, he did not read from a card, and did not even have a card in his hand; he had only a notebook and a pencil. Appellant testified that when they first entered the interview room, he demanded an attorney, but Granillo replied that he did not need one. Appellant claimed that he refused to speak without a lawyer present, but after Granillo threatened to write

a report that would be harmful to him, unless appellant spoke to him, appellant felt obligated to speak.

Appellant contends that on appeal, we must consider his testimony and review all the evidence de novo to determine the voluntariness of his confession.

Whether to suppress a statement under *Miranda* is a mixed question of fact and law. (*People v. Mickey* (1991) 54 Cal.3d 612, 649.) An appellate court applies a de novo standard of review only to the trial court's legal determination of the validity of a waiver or the voluntariness of a statement. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) The trial court's findings of fact are reviewed for substantial evidence. (*Id.* at p. 731; *People v. Mickey, supra*, 54 Cal.3d at p. 649.)

Since there was conflicting testimony, “we must accept that version of events which is most favorable to the People, to the extent that it is supported by the record.” [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 383-384.) Detective Granillo's testimony provides substantial evidence that he gave appellant his *Miranda* warnings and that appellant understood them. Thus, even if appellant's testimony might be found to be just as plausible, we must accept the trial court's resolution of the conflicts and its credibility evaluations. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.)

Since appellant was told that he had the right to remain silent, and to have an attorney present, and he said that he understood those rights, his willingness to speak to Granillo alone amounted to an implied waiver. (*People v. Whitson* (1998) 17 Cal.4th 229, 247-248.) Thus, any claim that he was not afforded such rights must fail. (See *People v. Combs* (2004) 34 Cal.4th 821, 847.)

2. *Substantial Evidence of Attempted Lewd Act on Child*

Appellant contends that the evidence was insufficient to support a conviction of attempting to commit a lewd act upon a child, in violation of section 664/288,

subdivision (a). “An attempt to commit a crime consists of two elements: specific intent to commit the crime, and a direct but ineffectual act done toward its commission.” (Pen. Code, § 21a; *People v. Swain* (1996) 12 Cal.4th 593, 604.) The act done toward its commission need not be an element of the underlying crime. (*People v. Dillon* (1983) 34 Cal.3d 441, 453.)

Appellant contends that the only evidence relevant to his attempt conviction consisted of the following facts: appellant came to the child’s door with a video, handed it to her through the partially open doorway without touching her, and asked her twice to “suck his dick”; she then closed the door without any interference by him. The facts as summarized by appellant, are indeed scant; however, we must review the *whole* record in the light most favorable to the judgment to determine whether it discloses substantial evidence, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

We must evaluate appellant’s entire course of conduct, as well as his prior history. (*People v. Memro* (1985) 38 Cal.3d 658, 698-699.) In the case of an attempted lewd act upon a child, we consider evidence of the appellant’s history of pedophilic interests and conduct. (See *People v. Herman* (2002) 97 Cal.App.4th 1369, 1390 (*Herman*).) We shall therefore summarize all the evidence of appellant’s conduct toward the victim in this case, Sandy R.

Sandy was 14 years old at the time of trial. She testified that she has lived with her parents, her 19-year-old brother, and her 18-year-old sister in an apartment building in Los Angeles, for about four years. She also has an older brother who lives nearby. Sandy identified appellant in court as a family friend whom she has known her entire life. He used to live behind their house before they moved to the apartment complex, and over the years her family has socialized with him, his daughters, stepchildren, ex-wife, and his present girlfriend, who is

the manager of the apartment building. Sandy's family lives in apartment No. 8, on the ground floor, and appellant lived upstairs, in apartment No. 19.

When asked whether appellant had ever touched her any way she did not want to be touched, she testified that he did so twice. The first time was around Christmastime, after they had moved to the apartment building, when she was 11 years old. She and her brother had found a bike that needed a chain, and took it home. Sandy asked her father if he had a chain, but he did not, and suggested that she ask appellant. She did, and appellant said, "Yeah, I've got one upstairs," so she went up to his apartment after stopping by her own to tell her mother where she was going.

Sandy had been to appellant's apartment many times before, usually to play with his stepdaughter or to find her mother. That day, she did not see appellant's girlfriend or stepchildren anywhere around. When she entered the apartment, appellant was already inside, sitting on the couch with his sweatpants halfway down, with his hand on his penis. She said, "Excuse me," and tried to leave, but he stopped her by grabbing her wrists and pulling her back inside. Appellant pulled her to the bed, which was in the same room as the couch, placed her on the bed on her back, and pulled down her jeans. He stood in front of her, pushing her with one hand as she tried to pull up her jeans, and holding both her wrists with the other hand. She explained that she was smaller then, and has grown a great deal since.

Sandy testified that she struggled and tried to kick, but he was too strong, and he prevented her from kicking by putting his legs around her knees and squeezing her legs between his. Appellant penetrated her vagina with his penis

and moved it in and out halfway several times.³ He said nothing during the rape, but when he finished, and Sandy had pulled up her pants and was leaving the apartment, he said, “Don’t tell nobody.” It seemed to Sandy that he had an angry expression as he said it, which made her afraid to tell anyone. She feared that he might do something to hurt one of her two brothers, because he expressed jealousy toward their attention to his girlfriend. She went home and took a shower without saying anything. There was a clear gooey substance that she had never seen before on her underwear. She rinsed them and put them in the laundry.

The prosecution’s expert on child sexual abuse, forensic pediatrician Lynne Ticson, examined Sandy two years later, after appellant’s arrest. She testified that Sandy had healed vaginal wounds consistent with forcible rape.

Sandy did not tell anyone for two years after the rape, but tried to avoid appellant during that time, and she would not accept rides alone with him unless she really needed a ride to her Tae Kwan Do lesson, which was very important to her. It was on one of those occasions, when Sandy was 13 years old, that the second unwanted touching took place. She testified that appellant was driving her to Tae Kwan Do class, and she was staring out the window, when she felt his hand on her left breast. Still driving with his left hand, he squeezed softly with his right hand for a few seconds until they arrived. She then pushed his hand away, left the car, and walked fast to her class. Appellant admitted in his statement to Detective Granillo that he had touched her breasts, although he claimed to have pulled over and touched them for five minutes.

Sandy could not remember when the video incident took place or how old she was. Appellant telephoned her, told her he had just rented the movie, “The

³ Appellant does not contend that there was insufficient evidence to convict him of having raped Sandy when she was 11 years old.

Green Mile,” and asked her if she would like to borrow it. Appellant admitted that he asked her in their telephone conversation whether her father were home, although he claimed that she telephoned him. Sandy said that she would like to borrow the video, and he came down immediately after hanging up.

Sandy answered appellant’s knock by opening the front door about halfway. After he handed her the movie, she thanked him and started to close the door, but he stopped the door with his hand and said, “Sandy, can you suck my dick?” Shocked, she asked, “What did you say?” He replied, “suck my dick,” and she could see his erect penis under the fabric of his sweatpants. She closed the door and set both locks.

Appellant relies upon *People v. La Fontaine* (1978) 79 Cal.App.3d 176 (*La Fontaine*), disapproved on another point in *People v. Lopez* (1998) 19 Cal.4th 282, 292-293. He contends that the facts of this case are similar to those of *La Fontaine*, where the defendant had picked up a hitchhiking 13-year-old-boy, and after conversing with him a while, asked the boy whether he wanted to make an easy five or ten dollars. (See *La Fontaine, supra*, 79 Cal.App.3d at p. 179.) When the boy asked the defendant how he could make this money, the defendant replied, “I give you a blow job,” to which the boy said no; the boy then opened the car door, got out of the car, and went home. (*Id.* at pp. 179-180.) The court held that a solicitation is mere preparation that cannot rise to the level of a criminal attempt. (*Id.* at p. 183.)

We agree with well reasoned criticism of *La Fontaine* in cases rejecting the categorical rule laid down in *La Fontaine* that verbal solicitation cannot constitute an attempt. (See e.g., *Herman, supra*, 97 Cal.App.4th at pp. 1386-1387; *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187-188.) “No bright line distinguishes mere preparatory acts from commencement of the criminal design.” (*Hatch v. Superior Court, supra*, 80 Cal.App.4th at p. 187.) We must consider the

defendant's entire course of conduct, since "none of the various 'tests' used by the courts can possibly distinguish all preparations from all attempts." (*People v. Memro, supra*, 38 Cal.3d at p. 699.)

In any event, we do not agree that the facts are *very* similar to those in *La Fontaine*, as appellant contends. Each case involved soliciting a minor to engage in lewd and lascivious acts, which the minor rejected, but the similarity ends there. (See *La Fontaine, supra*, 79 Cal.App.3d at pp. 179-180.) Here, appellant's intent could not have been more clear. He had a proven sexual interest in Sandy, having forcibly raped her when she was 11 years old, and having, by his own admission, fondled her breasts sometime before she turned 14 years old, and he appeared at her door with an erection, after confirming that her father was not in the apartment.

"The courts have recognized that the more clearly the intent to commit the offense is shown, the less proximate the acts need be to consummation of the crime. [Citations.] '[T]he plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement.' [Citation.]" (*Hatch v. Superior Court, supra*, 80 Cal.App.4th at pp. 187-188.)

"Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]" (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

Appellant planned his intended crime well. He telephoned Sandy, enticed her with a movie, verified that she was alone in her apartment, and wore easily removable sweatpants, just as he had when he raped her. But appellant went beyond mere preparation or planning. He went immediately to Sandy's apartment, prevented her from closing the door, made his solicitation, and repeated it in reply

to her shocked response. This was “a direct but ineffectual act done toward [the] commission” of the lewd or lascivious act he intended to commit. (§ 21a; see § 288, subd. (a).) We conclude that his attempt conviction is supported by substantial evidence.

3. *Sentencing to the Upper Term Under Blakely*

Appellant contends that that the trial court committed sentencing error under the recent United States Supreme Court opinion in *Blakely v. Washington* (2004) 542 U.S. ____, 124 S.Ct. 2531 (*Blakely*), and under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), when it imposed the upper term on counts 2 and 4. Since the trial court did not select the upper term for count 4, we consider appellant’s contention only with regard to count 2.

Apprendi held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.) In *Blakely*, the United States Supreme Court explained that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ [citation], and the judge exceeds his proper authority.” (*Blakely, supra*, 542 U.S. ____, 124 S.Ct. at p. 2537, italics in original.)

Under the California determinate sentencing law, a sentencing court must impose the middle term unless it finds there are factors in mitigation or

aggravation; and only where factors in aggravation are found to exist may the court impose the upper term. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; Pen. Code, § 1170, subd. (b).) We have compared the California statute with the Washington statute reviewed in *Blakely*, and finding the two analogous, conclude that the middle term in the California statute is the “‘statutory maximum’ for *Apprendi* purposes.” Thus, imposition of the upper term may be based only upon aggravating factors found by a jury beyond a reasonable doubt or admitted by the defendant. (*People v. White* (2004) 124 Cal.App.4th 1417, 1437.)⁴

Count 2 charged appellant with a violation of section 288, subdivision (b)(1), which provides: “Any person who commits [any act in violation of § 288, subd. (a)] by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.” Subdivision (a) proscribes “any lewd or lascivious act . . . upon . . . a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.”

Count 2 thus charged a violation of section 288 based upon the facts charged in count 1, but under subdivision (b). The trial court recognized that count 2 was based upon the same facts, the forcible rape of the victim, and accordingly, stayed the sentence on count 2 after imposing the upper term, stating: “The court will select the high base term . . . given the fact that it was a substantial sexual contact.”

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In this regard, we disagreed with *People v. Wagener* (2004) 123 Cal.App.4th 424, review granted January 12, 2005, S129579, and *People v. Picado* (2004) 123 Cal.App.4th 1216, review granted January 19, 2005, S129826.

It cannot be doubted that rape is a substantial sexual contact.⁵ Appellant had been convicted by the jury of rape, alleged in count 1, and thus, the aggravating factor used by the trial court was found to be true by the jury beyond a reasonable doubt, and therefore was not *Blakely* error. (See *Blakely, supra*, 542 U.S. ____ , 124 S.Ct. at p. 2537.)

Appellant also contends that the trial court's imposition of a consecutive term with regard to count 3 falls within *Blakely*. Neither *Blakely* nor *Apprendi* involved sentencing for multiple offenses, and did not reach the issue of consecutive sentencing.

“While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing. [Citations.]” (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923; see Pen. Code, § 669.)

When the court imposes a consecutive sentence, it is not increasing the statutory maximum sentence, but merely deciding that the sentences for two separate offenses found true by a jury, should not be served at the same time. Thus, so long as each sentence is properly determined under *Blakely*, the court is not required to allow the defendant to serve them concurrently and, *Apprendi* and

⁵ Any touching of a child, not just rape, for the purpose of sexual gratification, committed by force or fear, will justify a conviction under section 288, subdivision (b)(1). Rape is therefore not an necessary element of the offense, and was appropriately used as an aggravating factor. (See generally, *People v. Scott* (1994) 9 Cal.4th 331, 350.)

Blakely do not apply to California's consecutive sentencing scheme. (*People v. Dalby* (2004) 123 Cal.App.4th 1083, 1103.)⁶

4. *Factors Supporting Consecutive Sentencing*

Finally, appellant contends that the trial court abused its discretion in ordering that the sentence on count 3 run consecutively.

Initially, the trial court imposed the mid-base term with regard to count 3, to run concurrently with the sentence imposed on counts 1 and 4. After sentence was pronounced, appellant asked to address the court. When the court consented, appellant said: "To begin with the girl, then the witnesses that she brought up, the detective, police officer and everything was made up by the D.A., and all of this was given to the D.A. and that's how it was tried. [¶] I have many things that haven't been under consideration in this trial. [¶] However, everything has been against me. I would like to know how they did it to sentence me for something that I never did, that never happened, ever."

The trial judge replied: "Okay. [¶] Anything else you want to add, because you just ruined it for me. You now indicate to me you have absolutely no remorse for your actions. [¶] You have further indicated to me that you believe the police and the victim are lying in this case, making me reconsider my sentencing choice as to count 3. [¶] I will choose as to count 3 instead -- because I didn't realized this aggravating factor still existed -- that the defendant, after terrorizing a young girl would also sit here and continue to call her a liar. [¶] And therefore, I reconsider my sentencing choice as to count 3, and as to that count I will impose

⁶ This issue is also before the California Supreme Court, which granted review in *People v. Jaffe* (2004) 122 Cal.App.4th 1559, on January 26, 2005.

instead of three years concurrent, because the defendant lacks remorse, a one-year consecutive sentence; that's one-third the mid base term consecutive."

Appellant contends that California Rules of Court, rule 4.425(b) prohibits imposing a consecutive term due to lack of remorse, because remorse is not listed as a circumstance in aggravation in California Rules of Court, rule 4.421. Rule 4.425(a) *suggests* criteria affecting the decision to impose a consecutive sentence, and rule 4.425(b) sets forth criteria that may *not* be used, and lack of remorse is not among them. *Any* circumstances in aggravation, however, may be considered by the sentencing judge, so long as it is "reasonably related to the decision being made [and is] stated on the record by the sentencing judge." (Cal. Rules of Court, rule 4.408.)

Appellant relies upon authority which held that lack of remorse should not be used to impose the upper term in a rape case, where the evidence of guilt consists primarily of the sharply conflicting testimony of only the defendant and the prosecuting witness, the evidence of guilt is not overwhelming, and the defendant steadfastly denies the rape. (E.g., *People v. Key* (1984) 153 Cal.App.3d 888, 900.)

Here, the evidence of appellant's guilt with regard to count 3 consisted of much more than the conflicting testimony of appellant and his victim. Further, the evidence of appellant's guilt is overwhelming, and appellant's denials have not been steadfast. The evidence established that appellant had raped the victim two years before, and he admitted to Detective Granillo, that on another occasion, he fondled her breasts for five minutes. Appellant did not claim that the video incident never happened at all; he told Granillo that Sandy called him to borrow

the video, and was waiting for him with nothing on but a sheet, which she pulled off, asking him if he would lick her vagina.⁷

In his trial testimony, appellant denied that he had raped Sandy, denied that he had touched her breasts for five minutes, and claimed that she had disrobed in the car and asked him to touch her breasts. And he claimed that if he touched her breasts it was the accidental result of pulling her clothing back on to cover her up. Appellant also claimed that he tried to avoid being alone with Sandy after that, but he admitted that he asked her, before bringing down the video, whether her father were there, and he admitted that he then came to her door, knowing that Sandy's father was not in the apartment with her. Appellant told Granillo that Sandy asked him to lick her vagina when he brought the video, but testified that she merely "insinuated" that she wanted him to "kiss her private parts."

A review of appellant's conduct gives rise to a strong inference of guilt. Appellant testified that he had known Sandy since she was a baby, that he had been friends with her parents for 23 years, and that he had two daughters of his own. He looked upon Sandy and her siblings as he would his own children, or at least his own nieces and nephews. And yet, he never told Sandy's parents about her alleged sexual behavior toward him.

In January 2003, Sandy finally told her YMCA counselor that her neighbor had sexually assaulted her. Appellant's girlfriend, Jeaneth Curtad, with whom appellant lived, testified that after social workers came to appellant's apartment to investigate, appellant became nervous, asked her for money, and told her that he was going to be away from their apartment until "everything calmed down." He

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The video incident occurred about three weeks before appellant's arrest, approximately two years after the rape, and a little more than a year after the breast-touching incident.

did not come home that night, and when Curtad checked the place he had always kept his passport, it was missing.

The next morning, Curtad spoke to appellant by telephone, and told him that she had arranged for a cash advance on her credit card. He came home shortly after that, and was still there when the police arrived. Curtad left him to go to Sandy's apartment to talk to her mother, and the police arrived about five minutes later. She accompanied them to her apartment, but appellant was gone, and the door was ajar. The police found him hiding in the bushes outside. Their guns drawn, the police ordered appellant out of the bushes, and detained him.⁸

Thus, appellant does not fit the criteria that make lack of remorse an inappropriate consideration in sentencing under the cited authority. (See *People v. Key*, *supra*, 153 Cal.App.3d at p. 900.) Considering lack of remorse in sentencing is inappropriate only where the defendant has denied guilt, *and* the evidence of guilt is not overwhelming. (See *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319; see also, *People v. Leung* (1992) 5 Cal.App.4th 482, 507-508 [denial of probation].) Here, since the evidence of appellant's guilt was overwhelming, we conclude that the trial court's consideration of lack of remorse was appropriate.

In any event, since lack of remorse is a sentencing consideration that is authorized by law under certain circumstances, but appellant did not object to the change in sentence or to the court's failure make the appropriate findings, he has waived appellate review of the court's sentencing choice. "A party in a criminal case may not, on appeal, raise 'claims involving the trial court's failure to properly

⁸ Appellant claimed that he was hiding from Sandy's father, whom he had seen with a gun, and he claims to have told this to the arresting officers, but Officer Ludi Alvarado testified that she was with appellant from the time he was ordered from the bushes until he was delivered to the station for booking, and he said nothing the entire time. The first time he told this story was to Granillo later that morning.

make or articulate its discretionary sentencing choices’ if the party did not object to the sentence at trial. [Citation.]” (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751, quoting *People v. Scott, supra*, 9 Cal.4th at p. 353.)

Underlying the trial judge’s conclusion that appellant lacked remorse, was her obvious outrage that appellant would lie to the court by accusing the police and the victim of fabricating events that had been proven at trial. Appellant contends that the judge’s reaction could be understood as a finding of perjury, particularly in light of the prosecution’s suggestion that the jury necessarily determined his testimony to be perjured, and he contends that perjury is an improper factor to consider in sentencing.

“A trial court’s conclusion that a defendant has committed perjury may be considered . . . in fixing punishment as it bears on defendant’s character and prospects for rehabilitation. [Citation.] In an effort to appraise a defendant’s character ““a fact like the defendant’s readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia.” [Citation.] [Citation.]” (*People v. Redmond* (1981) 29 Cal.3d 904, 913-914; *U.S. v. Dunnigan* (1993) 507 U.S. 87, 96-97.) The sentencing court must, however, explain its reasoning and “make on-the-record findings encompassing all the elements of a perjury violation. In California, those elements are a willful statement, under oath, of any material matter which the witness knows to be false. (Pen. Code, § 118.)” (*People v. Howard* (1993) 17 Cal.App.4th 999, 1004, citing *U.S. v. Dunnigan, supra*, 507 U.S. at pp. 96-97.)

Here, the trial court did not make findings encompassing the elements of perjury, but since appellant did not object at sentencing to the court’s failure to state its findings, he may not now urge this error as a ground for reversal. (See *People v. Gonzalez, supra*, 31 Cal.4th at p. 751; *People v. Scott, supra*, 9 Cal.4th at pp. 353, 357.) In any event, we have already concluded that the trial court properly

used of lack of remorse as a factor supporting the consecutive sentence, and a single aggravating factor will support the imposition of a consecutive sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.